IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 11 Case
	)	Number 95-10548
HEALTHMASTER HOME HEALTH CARE, INC.	)	
	)	
Debtor	)	
	)	
HEALTHMASTER HOME HEALTH CARE, INC.	)	FILED
	)	at 3 O'clock & 01 min. P.M.
	)	Date: 9-9-96
Movant	)	
	)	
vs.	)	
	)	
DENNIS KELLY	)	
	)	
Respondent	)	
	)	

ORDER

Healthmaster Home Health Care, Inc. (hereinafter "Healthmaster") objects to proofs of claim 198, 199 and 200 filed by Dennis Kelly, which claims arise out of Mr. Kelly's former employment with Healthmaster and its predecessor and related entities. Healthmaster filed a Motion for Summary Judgment, alleging that Mr. Kelly's claims are barred by the statute of limitations and by the statute of frauds. For the reasons that

follow, Healthmaster's motion is denied.

Under Federal Rule of Civil Procedure 56 (applicable to bankruptcy cases under Federal Rule of Bankruptcy Procedure 7056), this Court will grant summary judgment only if "...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ. 56(c). The moving party has the burden of establishing its right of summary judgment. See, Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). The Court has jurisdiction to hear this matter as a core bankruptcy proceeding under 28 U.S.C. §157(b)(2)(A)&(B) and 28 U.S.C. §1334(b).

The facts, viewed in a light most favorable to Mr. Kelly, are briefly summarized as follows. On or about October 31, 1984, Jeanette Garrison, as agent of Healthmaster's predecessor corporations, offered employment to Mr. Kelly. Mr. Kelly, a Certified Public Accountant, had been engaged in private practice with many clients, including Healthmaster's predecessor corporations. Ms. Garrison offered to pay Mr. Kelly $100,000.00 annually with annual cost of living increases, annual performance increases, periodic bonuses, and a company vehicle. Additionally,

Ms. Garrison agreed to pay Mr. Kelly a $1,000,000.00 bonus upon the sale of a related corporate entity, but not later than five years from the commencement of Mr. Kelly's employment on January 2, 1985.

At Ms. Garrison's request, Mr. Kelly summarily terminated his accounting practice and began full time employment with the predecessor corporations on January 2, 1985. Approximately five years after Mr. Kelly's employment began, Ms. Garrison acknowledged that Healthmaster owed Mr. Kelly the $1,000,000.00 bonus, but no subsidiary had been sold in the preceding five years. As an inducement for Mr. Kelly to forgo the initial $1,000,000.00, Ms. Garrison offered to pay Mr. Kelly that $1,000,000.00 plus an additional $1,000,000.00 bonus as soon as Healthmaster related entity was sold, but not later than five years from that date. Ms. Garrison also promised continued annual bonuses from Healthmaster and/or its subsidiary corporations. From 1990 to 1994, Mr. Kelly received the following bonuses:

1990	$ 77,000.00
1991	$ 75,000.00
1992	$ 75,000.00
	$ 10,000.00
1993	$150,000.00
1994	$150,000.00
	$ 50,000.00

Mr. Kelly's employment terminated on March 16, 1995. On April 10, 1995, Healthmaster filed a Chapter 11 bankruptcy petition. Thereafter, Mr. Kelly filed proofs of claim 198, 199 and 200.

Proof of claim 198 represents a $150,000.00 employment bonus Mr. Kelly asserts Healthmaster owes him for his employment from January 1, 1995 through his March 16, 1995. Claim 199 represents the initial $1,000,000.00 bonus promised by Ms. Garrison in 1984. Claim 200 represents the additional $1,000,000.00 bonus promised by Ms. Garrison in 1990. A proof of claim filed by a creditor is deemed allowed unless a party in interest objects to the claim. 11 U.S.C. §502[1]. If a party in interest objects to the claim, the court must determine, inter alia, the extent to which the claim is allowed under any agreement or applicable state law.

I. HEALTHMASTER IS NOT ENTITLED TO SUMMARY JUDGMENT ON CLAIM 198.

Official Code of Georgia Annotated (O.C.G.A.) §34-7-1[2]

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[1]11 U.S.C. §502 provides in part:

(a) A claim of interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (I) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

[2]O.C.G.A. §34-7-1 provides in part:

... An indefinite hiring may be terminated at will by either party.

provides that unless an employment agreement includes a definite period of employment, the hiring is terminable at will by either party. The parties agree that Mr. Kelly had no written contract of employment and no-agreed upon period of employment, and was therefore an employee at will under Georgia law. Healthmaster asserts that as an employee at will, Mr. Kelly cannot enforce any executory obligations of Healthmaster, including the promise to pay annual bonuses. In support of this contention, Healthmaster cites Wheeling v. Ring Radio Co., 213 Ga. App. 210, 444 S.E.2d 144 (1994). In Wheeling, the plaintiff, a discharged terminable at will employee, sought to enforce executory promises of yearly bonuses made at the inception of his employment. The employer had hired the plaintiff for three years, but terminated him after only two years. The plaintiff sued the employer to recover the third years' salary and bonus. The Court of Appeals affirmed the trial court's entering summary judgment for the employer, finding the executory promises made pursuant to a terminable at will contract unenforceable under Georgia law. Id. at 146.

Unlike the plaintiff in Wheeling, Mr. Kelly is not seeking to enforce executory promises breached as a result of an alleged wrongful termination. Instead, Mr. Kelly seeks to recover a bonus he allegedly earned between January 1, 1995 and March 16, 1995. Under Georgia law, salary and bonuses earned by at will employees

under oral employment agreements are recoverable, unlike purely executory promises which are unenforceable. Arby's Inc. v. Cooper, 213 Ga. App. 312, 444 S.E.2d 374 (1994), *rev'd on other grounds* 265 Ga. 240, 454 S.E.2d 488 (1995). In Arby's, the plaintiff sued Arby's for an annual bonus he earned prior to his resignation. The Court of Appeals affirmed the trial judge's denial of Arby's motion for a directed verdict, holding that a terminable at will employee may recover unpaid bonuses which are based upon oral promises. Id. at 375. Mr. Kelly, like the plaintiff in Arby's, seeks to recover a bonus he allegedly earned prior to his termination. An issue of fact exists concerning whether Mr. Kelly earned any bonus for the portion of 1995 employment making summary judgment improper[3].

II. HEALTHMASTER IS NOT ENTITLED TO SUMMARY JUDGMENT ON CLAIMS 199 AND 200.

A. Claim 199 and 200 Are Not Time Barred.

Healthmaster alleges that Claims 199 and 200 are barred by

[3]In Arby's, Inc. v. Cooper, 265 Ga. 240, 454 S.E.2d 488 (1995), the Georgia Supreme Court reversed the Court of Appeals decision discussed above, but did not disturb the rationale concerning the enforceability of oral promises for employment bonuses. Instead, the Supreme Court reversed because the oral contract did not definitively and objectively calculate the amount of annual bonus. Id. at 489. Because Healthmaster has presented no evidence with this motion concerning whether the bonus was to be calculated according to the standards set forth by the Supreme Court, I do not reach that issue.

the two year statute of limitations of O.C.G.A. §9-3-22.[4] However, this provision applies only to actions for wages arising under a specific statutory provision, not to wages payable under an express or implied contract or to a claim of quantum meruit. Bass v. Hilts S. Equip. Co., 151 Ga. App. 883, 261 S.E.2d 787 (1979). Therefore, the four year statute of limitations of O.C.G.A. §9-3-25[5] applies to this oral contract.

Claim 199 stems from a promise made in 1984 to pay $1,000,000.00 as soon as a corporate subsidiary was sold or within five years from the commencement of Mr. Kelly's employment. Therefore, Mr. Kelly's right of action to enforce this promise accrued on January 2, 1990, and the four year statute of limitations would have expired after January 2, 1994. Although Mr. Kelly's time to file an action on this initial promise has expired, he asserts that in December of 1989 Ms. Garrison entered into a new promise to

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[4]O.C.G.A. §9-3-22 provides:
All actions for the enforcement of rights accruing to individuals under statutes or acts of incorporation or by operation of law shall be brought within 20 years after the right of action has accrued; provided, however, that all actions for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued.

[5]O.C.G.A. §9-3-25 provides:
All actions upon open account , or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied promise or undertaking shall be brought within four years after the right of action accrues. ...

pay the initial $1,000,000.00 plus an additional $1,000,000.00 as soon as a subsidiary sold, but not later that five years from that date. His right to enforce these promises first accrued in December 1994, five years after Ms. Garrison made them. Therefore, his right of action on these promises will not expire until December 1998, and Claims 199 and 200 are thus not time barred.

B. The Claims Are Not Barred by the Georgia Statute of Frauds.

Healthmaster asserts that Claims 199 and 200 are barred because the underlying promises to pay were not reduced to writing. O.C.G.A. §13-5-30[6] enumerates seven categories of obligations which are unenforceable unless made in writing and signed by the promisor. Subsection (5) bars enforcement of any oral promise which cannot be performed within one year. However, this provision does not apply

[6]O.C.G.A. §13-5-30 provides:
To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:
(1) A promise by an executor, administrator, guardian, or trustee to answer damages out of his own estate;
(2) A promise to answer for the debt, default, or miscarriage of another;
(3) Any agreement made upon consideration of marriage...
(4) Any contract for sale of lands...
(5) Any agreement that is not to be performed within one year from the making thereof;
(6) Any agreement to revive a debt barred by a statute of limitation; and
(7) Any commitment to lend money.

to Claims 199 and 200 because Healthmaster could have sold a subsidiary and paid the bonuses within one year of making the promises. Claims 199 and 200 could have been performed within one year and do not fall within the statute of frauds notwithstanding the fact that the contingency did not actually occur within one year. See, Mills v. Barton, 205 Ga. App. 413, 422 S.E.2d 268 (1992).

Healthmaster also asserts that the promise to extend the time for paying the initial $1,000,000.00 constituted an attempt to revive a debt barred by a statute of limitations, which revival must be in writing under §13-5-30(6). However, the "revival" occurred in December of 1989 prior to the expiration of the four year statute of limitations, making subsection (6) inapplicable.

It is therefore ORDERED that Healthmaster's Motion for Summary Judgment is DENIED.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 9th day of September, 1996